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ROBERTO H. VILLAFUERTE

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

ROBERTO H. VILLAFUERTE,

Plaintiff,

v.

SPECIALIZED LOAN SERVICING,  
LLC; and DOES 1 through 50, inclusive,

Defendants.

**Case No.: 8:14-cv-00124-JLS-RNB**

*(Orange County Superior Court Case  
No.30-2013-00694268-CU-0R-CJC)*

**NOTICE OF MOTION AND  
MOTION TO REMAND;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**DATE: April 11<sup>th</sup>, 2014**

**TIME: 2:30 p.m.**

**DEPT: 10A**

Action filed on December 19, 2013

**TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF  
RECORD HEREIN:**

**PLEASE TAKE NOTICE** that on April 11<sup>th</sup>, 2014 at 2:30 p.m. or as soon  
thereafter as the matter may be heard in Courtroom 10A of the above entitled Court  
located at United States Courthouse, 411 West Fourth Street, Room 1053, Santa

1 Ana, CA 92701-4516. Roberto Villafuerte will move the court for an order,  
2 pursuant to 28 U.S.C. § 1447(c), remanding this action to the Superior Court in and  
3 for the County of Orange and granting attorney's fees and costs to Plaintiff.  
4

5 Plaintiff moves for remand on the grounds that:

6 Plaintiff's complaint does not raise a substantial federal question that is  
7 necessary to resolution of any of California's claims.

8 California's motion for remand is based on this notice of motion and motion  
9 to remand, the memorandum of law filed in support of this motion, and such other  
10 and further evidence and argument, both written and oral, as may be presented to  
11 the Court before the motion is submitted for decision.  
12

### 13 **MEMORANDUM OF POINTS AND AUTHORITIES**

#### 14 **I. INTRODUCTION**

15 Plaintiff asks this Court to remand this action to state court. Removal to  
16 federal court was improper because no basis for removal appears on the face of the  
17 complaint.  
18

19 On or about October 28, 2004, Plaintiff refinanced his home by executing a  
20 Note and Deed of Trust in the amount of \$365,000.00 with BANK OF AMERICA,  
21 N.A.  
22

23 Plaintiff made payments on the refinance loan with due diligence, until he  
24 started to suffer hardship on or about the end of 2012 because his employer  
25 reduced his hours and Plaintiff was no longer making the same amount of money.  
~

1 Plaintiff looked for part time jobs to bring up his current income, but he was not  
2 able to find another job.

3       Plaintiff applied for a loan modification with Defendants, but he was told  
4 that in order to be able to qualify for a loan modification Plaintiff was required to  
5 be in a hardship, which he was. However, at the time of his initial inquiry with  
6 Defendants, Plaintiff was current with his payments. Plaintiff explained to the  
7 agent of the bank that he was suffering loss of income and wanted to act sooner  
8 before spending money he saved in his reserves. Defendants told Plaintiff that he  
9 was not able to qualify for anything and they denied his application.  
10

11       Plaintiff made all payments in a timely manner and according to the terms of  
12 the loan through BANK OF AMERICA, N.A. until the loan was transferred to  
13 Defendant, SPECIALIZED LOAN SERVICING, LLC (hereinafter "SLS").  
14

15       Although Plaintiff's monthly payments became unaffordable, he worked  
16 very hard to make ends meet, but he reached a point where he was no longer able  
17 to keep making payments and fell behind. Plaintiff applied for a loan modification  
18 again in January 2013 and submitted a complete package with all of his financial  
19 information, but he quickly received a computer generated denial letter stating that  
20 the "investor" does not participate with the Home Affordable Modification  
21 Program ("HAMP").  
22

23       However, the real estate agent who sold Plaintiff the home told him that,  
24 both BANK OF AMERICA, N.A. and Defendant SLS participate in HAMP.  
25

1 Plaintiff repeatedly sent several loan modification applications to SLS  
2 several times over a three month period. On or about April 2013, Plaintiff received  
3 information from SLS requiring the same information he already provided to SLS  
4 over the three month period. Nonetheless, Plaintiff sent the proper information  
5 again. Plaintiff tried to contact an SLS representative named Marie to get more  
6 information regarding his loan, but he was only able to leave voice-mail messages.  
7

8 Plaintiff started to panic about the whole situation and contacted Keep Your  
9 Home California ("KYHC") to request relief. KYHC also told and confirmed with  
10 Plaintiff SLS participated in HAMP and KYHC pre-approved Plaintiff's  
11 application to repay the past due balance, but Plaintiff was waiting for a response  
12 from SLS to accept the funds.  
13

14 A representative from SLS contacted Plaintiff and told him they were  
15 waiting for a reply from an investor regarding the KYHC program. Plaintiff asked  
16 the representative if he could tell him the name of the investor, but the SLS  
17 representative refused to disclose the true identity of said "investor" and only  
18 stated it was BANK OF AMERICA, N.A.  
19

20 Despite the fact Plaintiff's loan was being reviewed for a modification,  
21 Defendant informed Plaintiff that it was not able to create an affordable payment  
22 for him and ultimately and intentionally refused to work with KYHC in order to  
23 bring the loan current.  
24

25 Plaintiff hired a real estate agent to assist him with the loan modification  
~

1 package because he started to realize his lack of education was placing him at a  
2 severe disadvantage. The real estate agent contacted a representative of SLS and  
3 the representative of SLS instructed Plaintiff to submit another new loan  
4 modification application. The real estate agent submitted Plaintiff's completed  
5 loan modification package under HAMP guidelines.  
6

7 Plaintiff, however, has made little progress. Defendant gave and continues  
8 to give Plaintiff the run-around and promises Plaintiff the loan modification  
9 application is under review, however, nothing came out of it.  
10

11 On December 19, 2013, Plaintiff filed a claim in the State for violation of  
12 California Statutes. On or about the same day, December 19, 2013, Defendant SLS  
13 removed Plaintiff's action in the District Court pursuant to 28 U.S.C. § 1441(b)  
14 under the diversity of citizenship of parties.  
15

16 Plaintiff now requests and moves the Court to remand his State claim action  
17 back to State Court.

## 18 **II. ARGUMENT**

### 19 **A. REMOVAL IS NOT PROPER BECAUSE DEFENDANT DID NOT** 20 **ASSERT A CLAIM INVOLVING A FEDERAL QUESTION IN ITS** 21 **COMPLAINT**

#### 22 **1) The Defendant Has the Burden of Demonstrating That Removal Is** 23 **Proper**

24 Defendants always have the burden of proving removal was proper, and  
25 alleges that the Corporation formed from Delaware State and the location of  
~ ~

1 business operation is in Colorado, but at the same time is registered and makes  
 2 business with the state of California. However, Defendant has failed to establish if  
 3 there is a Federal question in the motion for removal. The Removal statute is  
 4 strictly construed, and any doubt about the right of removal is resolved in favor of  
 5 remand. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Prize Frieze,*  
 6 *Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999). Consequently, if a  
 7 Plaintiff challenges the Defendant's removal of a case, the defendant bears the  
 8 burden of establishing the propriety of the removal. *See Gaus*, 980 F.2d at 566;  
 9 *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996).

12 **2) Defendants' Diversity Jurisdiction claim fails because they are entitled**  
 13 **to do business in California.**

14 Defendant conducts business in the State of California and allegedly is the  
 15 party entitled to receive funds from Plaintiff loan in California.

16 Defendant's Notice of Removal alleges that "based upon information and  
 17 belief," Plaintiff is a resident and citizen of the State of California which Plaintiff  
 18 offers no objection, but also states SLS is incorporated in the State of Delaware  
 19 with its principal place of business in the State of Colorado, yet Defendant fails to  
 20 assert its own citizenship for diversity purposes. **(Notice of Removal at 2 ¶ 4)**

22 Defendant also fails to establish the citizenship of the DOE Defendants 1-50.  
 23 As a party seeking to invoke diversity jurisdiction, Defendant should be able to  
 24 allege affirmatively, the actual citizenship of relevant parties. Plaintiff has yet to  
 25

1 discover the identity of DOE Defendants 1-50. “Absent unusual circumstances, a  
2 party seeking to invoke diversity jurisdiction should be able to allege affirmatively  
3 the actual citizenship of the relevant parties.” *See Kanter v. Warner-Lambert Co.*,  
4 265 F.3d at 857; *See also, Bryant v. Ford Motor Co.*, 794 F.2d 450, 451 (9th Cir.  
5 1986) (“the district court lacked jurisdiction over this action because of the  
6 presence of potentially non-diverse Doe defendants at the time of removal from  
7 state court.”).

8  
9 It is proper to consider the DOE Defendants in determining whether removal  
10 is proper, even though the DOE Defendants have not been served. *Apelian v. U.S.*  
11 *Shoe Corp.*, 664 F.Supp. 1370, 1372 (9th Cir. 1987); *See also, Preaseau v.*  
12 *Prudential Ins. Co. of America*, 591 F.2d 74, 78 (“the Ninth Circuit held that  
13 diversity was destroyed and that Defendant could not remove “if the citizenship of  
14 any codefendant, joined by the Plaintiff in good faith, destroys complete diversity,  
15 regardless of service or non-service upon co-defendant”). Where the identity of  
16 alleged defendants is not known prior to the filing of the complaint, “plaintiff  
17 should be given an opportunity through discovery to identify the unknown  
18 defendants.” *Gillispie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1968). In  
19 conclusion, Doe defendants are citizens of California which is the State in which  
20 the federal court sits. *See Apelian v. U.S. Shoe Corp.*, 664 F.Supp. at 1372.  
21 Remanding the action will effectuate the policies of preventing removal where one  
22 defendant is a citizen of the forum state and thus would not be prejudiced against  
23  
24  
25  
~

1 in the state court”. *See Apelian v. U.S. Shoe Corp.*, 664 F.Supp. at 1372.

2 Furthermore, none of the DOE Defendants, as forum defendants, have been  
 3 served with Plaintiff’s action at the time Defendant served its Notice of Removal  
 4 on Plaintiff. Due to the nature, quality, and substance of Plaintiff’s State claims,  
 5 DOE Defendants are integral to his State claims because DOE Defendants claim to  
 6 have a property interest in the subject property. Namely, DOE Defendants 1-50  
 7 claim some right, title, estate, lien, or interest in the subject property, adverse to  
 8 Plaintiff’s own title. Each of these claims constitutes a cloud on Plaintiff’s title to  
 9 the subject property from which Plaintiff seeks relief. Failure to comply with the  
 10 forum defendant rule renders removal procedurally defective. *Lively v. Wild Oats*  
 11 *Markets, Inc.*, 456 F.3d 933, 936 (2006).

12 Therefore, Defendant’s allegations are insufficient to invoke this Court’s  
 13 diversity jurisdiction. Thus, Defendant has failed to meet its burden to demonstrate  
 14 the Court’s diversity jurisdiction.

### 15 **3) Plaintiff’s Complaint Contains Causes of Action Arising Entirely under** 16 **State Law**

17 Plaintiff’s complaint asserts causes of action which all arose entirely under  
 18 State law. There are no causes of action or issues specified in the complaint which  
 19 arise under the Constitution, laws, or treaties of the United States. In fact, the  
 20 complaint is devoid of any mention of any provisions of the Constitution, laws or  
 21 treaties of the United States. Therefore since on the face of the complaint, there is  
 22  
 23  
 24  
 25



no federal question, the Court lacks subject matter jurisdiction over this action.  
*Rivet v. Regions Bank*, 522 U.S. at 476.

**4) Plaintiff's Claim does *not* exceed \$75,000.00.**

Plaintiff is suing for damages that are related to loan modification and Defendants' failure of a good faith review of Plaintiff's loan modification application under the *California Homeowners Bill of Rights* ("HBOR"). Here, Plaintiff wishes to keep his home which was the basis of his claim against Defendants. Under HBOR law the fines per each incident are \$7,000.00 up to 50,000.00 in total.

According to Defendant SLS's Removal, (Page 5 ¶ 1), "In actions seeking declaratory relief or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). In contrast to SLS's contention, Plaintiff is not seeking a declaratory relief or injunctive relief as his loan is not in default or in a pre-foreclosure stage. Hence, it is premature to assume that the value of his claim is the value of his home or the amount of his existing loan.

Defendant provides "if the primary purpose" of Plaintiff's "lawsuit is to enjoin a bank from selling or transferring property, then the property is subject to the litigation." *Reyes v. Wells Fargo Bank, N.A.*, 2010 WL 2629785 (N.D. Cal June 29, 2010). Under federal law 26 U.S. Code § 581:

1 the term "bank" means a bank or trust company incorporated and doing  
2 business under the laws of the United States (including laws relating to the  
3 District of Columbia) or of any State, a substantial part of the business of  
4 which consists of receiving deposits and making loans and discounts, or of  
5 exercising fiduciary powers similar to those permitted to national banks  
6 under authority of the Comptroller of the Currency, and which is subject by  
7 law to supervision and examination by State, Territorial, or Federal authority  
8 having supervision over banking institutions. Such term also means a  
9 domestic building and loan association.

10 SLS, as alleged in Plaintiff's State claim is merely a diversified financial  
11 loan servicer and is not effectively a bank, because although it is incorporated and  
12 doing business under the laws of the United States, it is not authorized to receive  
13 deposits and make loans and discounts nor does it have authority to exercise  
14 fiduciary powers similar to those permitted by national banks under the authority  
15 of the Comptroller of the Currency because it merely functions as a third-party  
16 servicer. Plaintiff is seeking from SLS a good faith review of the current status of  
17 his loan in order for him to be able to make affordable monthly mortgage payments  
18 on the loan. Plaintiff is, and always was, the owner and borrower of his home loan  
19 as of 2002 even prior to his current refinance loan currently serviced by SLS.  
20 Therefore, the object of Plaintiff's State claim or litigation, is for relief on his loan,  
21 not selling or transferring the property of his home. Again, it is premature to  
22 assume that the value of Plaintiff's claim is the value of his home or the amount of  
23 his existing loan because Plaintiff's loan is not in default or in a pre-foreclosure  
24 stage.  
25

1 While Plaintiff does not dispute his stricken financial hardship and late  
 2 mortgage payments, his loan is not in default. Plaintiff's claim is based on  
 3 Defendant's violations of the newly enacted law in California, HBOR for failure to  
 4 provide Plaintiff with a single point of contact and verification of documents under  
 5 the provisions of HBOR. These violations do not go beyond the District Court's  
 6 threshold of over \$75,000.00 amount of controversy. In addition, Defendants'  
 7 removal basis is devoid of argument how they came up with the amount of  
 8 controversy in excess of \$75,000.  
 9

10  
 11 In sum, SLS failed to show the prerequisite for removal to federal  
 12 jurisdiction, failure to do so - the District Court is required to remand a case to  
 13 State Court. Also, if, at any time before final judgment, it determines that it lacks  
 14 subject matter jurisdiction, Court is required to remand this case to State court. 28  
 15 U.S.C. § 1447(c). Unlike personal or territorial jurisdiction, lack of subject matter  
 16 jurisdiction cannot be waived.  
 17

## 18 **II. CONCLUSION**

19 For all the foregoing reasons, Plaintiff respectfully requests that this Court  
 20 remand this action back to Orange County Superior Court.  
 21

22 DATED: March 4<sup>th</sup>, 2014

23 BY: /s/ Randal A. Whitecotton

24 RANDAL A. WHITECOTTON, ESQ.  
 25  
 26

**CERTIFICATE OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 900 N Broadway 8<sup>th</sup> Floor. Santa Ana, CA 92701.

On March 5, 2013, I served the foregoing document described as **NOTICE OF MOTION AND MOTION TO REMAND; MEMORANDUM OF POINTS AND AUTHORITIES** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as stated on the attached service list:

☒ **BY MAIL** – I deposited such envelope in the mail at **Santa Ana**, California. The envelope was mailed with postage thereon fully prepaid. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California I the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY PERSONAL SERVICE** – I caused such envelope to be delivered by a process server employed by \_\_\_\_\_.

☐ **VIA FACSIMILE** – I faxed said document, to the office(s) of the address(s) shown above, and the transmission was reported as complete and without error.

☐ **BY ELECTRONIC TRANSMISSION** – I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(s) indicated.

**aahao@wolfewyman.com**

**hskhalsa@wolfewyman.com**

☐ **BY OVERNIGHT DELIVERY** – I deposited such envelope for collection and delivery by \_\_\_\_\_ with delivery fees paid or provided for in accordance with ordinary business practices. I am “readily familiar” with the firm’s practice of collection and processing packages for overnight delivery by \_\_\_\_\_. They are deposited with a facility regularly maintained by \_\_\_\_\_ for receipt on the same day in the ordinary course of business.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on **March 5, 2014** at **Santa Ana**, California.

\_\_\_\_\_  
/s/ David Morales  
DAVID MORALES